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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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U.S. Citizenship
and Immigration
Services

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FILE:

Office: NEBRASKA SERVICE CENTER

Date: MAR 02 2011

IN RE:

Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability or a member of the professions holding an advanced degree. The petitioner seeks employment as a postdoctoral research fellow. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a statement and additional evidence. For the reasons discussed below, we uphold the director's ultimate determination that the petitioner has not established his eligibility for the benefit sought.

Section 203(b) of the Act states in pertinent part that:

(2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --

(A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of job offer.

(i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner holds a Ph.D. in Environmental Engineering from the Stevens Institute of Technology. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest.

Neither the statute nor pertinent regulations define the term “national interest.” Additionally, Congress did not provide a specific definition of the phrase, “in the national interest.” The Committee on the Judiciary merely noted in its report to the Senate that the committee had “focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . .” S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

A supplementary notice regarding the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991), states, in pertinent part:

The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the “prospective national benefit” [required of aliens seeking to qualify as “exceptional.”] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215, 217-18 (Comm'r. 1998) (hereinafter “NYSDOT”), has set forth several factors that U.S. Citizenship and Immigration Services (USCIS) must consider when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, the petitioner must show that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, the petitioner must establish that the alien’s past record justifies projections of future benefit to the national interest. *Id.* at 219. The petitioner’s subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. We include the term “prospective” to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. *Id.*

We concur with the director that the petitioner works in an area of intrinsic merit, the corrosion and dissolution of tungsten, and that the proposed benefits of his work, an improved understanding and reduction of risks from this metal, would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

Eligibility for the waiver must rest with the alien’s own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *NYSDOT*, 22 I&N Dec. at 218. Moreover, it cannot suffice to state that the alien possesses useful

skills, or a “unique background.” Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

At issue is whether this petitioner’s contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. In evaluating the petitioner’s achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

The petitioner submitted evidence that he is a senior member of the American Institute of Chemical Engineers (AIChE) and a member of the American Chemical Society. While the letter from AIChE indicates that senior membership is “the first step toward qualifying for the esteemed grade of AIChE Fellow,” the petitioner did not submit evidence of the requirements for senior membership or evidence that he is a fellow. As noted by the director, professional memberships are one type of evidence that a petitioner can submit to establish exceptional ability. 8 C.F.R. § 204.5(k)(3)(ii)(E). Because exceptional ability, by itself, does not justify a waiver of the alien employment certification requirement, arguments hinging on professional memberships, while relevant, are not dispositive to the matter at hand. *Id.* at 222.

The petitioner also submitted [REDACTED] from the Center for Environmental Systems, Stevens Institute of Technology. The petitioner was a student at the Stevens Institute of Technology at the time. This certificate does not demonstrate the petitioner’s influence beyond that institute and, as student recognition, does not distinguish the petitioner from members of his field who have completed their education. In addition, recognition issued at the time a paper is presented may demonstrate its potential significance, but cannot demonstrate its ultimate impact once disseminated in the field. Moreover, as with memberships, formal recognition from peers is one type of evidence that a petitioner can submit to establish exceptional ability. 8 C.F.R. § 204.5(k)(3)(ii)(F). Because exceptional ability, by itself, does not justify a waiver of the alien employment certification requirement, arguments hinging on formal recognition, while relevant, are not dispositive to the matter at hand. *NYSDOT*, 22 I&N Dec. at 222.

The petitioner submitted an email from [REDACTED] *Environment*. [REDACTED] addressed the email to [REDACTED] Technology and inquired whether [REDACTED] or “someone in your department” would be able to review a manuscript for the journal. [REDACTED] one of the petitioner’s Ph.D. dissertation advisors and the petitioner’s current supervisor, forwarded the email to the petitioner. In two separate emails, [REDACTED] thanks the petitioner for completing the review. It is significant that [REDACTED] initially contacted [REDACTED] regarding the review. Thus, the review request is not evidence that [REDACTED] was previously aware of the petitioner or his work. Moreover, [REDACTED] indicated he would accept a review from

“someone” in [REDACTED] department, revealing that the review required only knowledge in the field rather than demonstrated influence in the field. Thus, the petitioner’s participation in the widespread review process inherent to peer-reviewed scientific journals is not persuasive evidence of his influence in the field.

The petitioner initially submitted evidence that he had authored the book [REDACTED]. The record reveals that VDM [REDACTED] published this book. The record contains no evidence that this company is a publishing company that selects books for publication through peer-review and pays authors an advance for the publication rights rather than simply offering publishing services for authors of academic dissertations. The record contains no evidence of the sales of this book.

The petitioner also initially submitted evidence that he had authored two articles and [REDACTED] article by [REDACTED] published in *Science of the Total Environment*. In response to the director’s request for additional evidence and on appeal, the petitioner submitted additional articles published after the date of filing. The petitioner must establish his eligibility as of that date. See 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg’l. Comm’r. 1971). Thus, we cannot consider this evidence. Prior to the date of filing, the petitioner also presented his work at five conferences, including presenting two papers at one conference. While the petitioner’s publications and presentations prior to the date of filing demonstrate that the petitioner’s work is original and has been disseminated in the field, at issue is the influence of this work upon dissemination.

The petitioner submitted a report titled [REDACTED]. The Institute for Environment and Health at the University of Leicester prepared the report. The report initially summarizes “reports and papers referenced by [REDACTED]. As part of this section, the report summarizes one of the petitioner’s conference presentations, concluding that the petitioner’s “preliminary” results “have suggested the presence of non-stoichiometric tungsten oxides as *possible* intermediates in the process.” (Emphasis added.)

The petitioner also submitted a British unclassified report titled [REDACTED]. The report cites one of the petitioner’s articles as a “further qualitative study” that “has confirmed the occurrence of galvanic corrosion in tungsten alloy and identified that the rate of corrosion of the binder phase was linked to both the quantity and type of metal elements within that phase.”

In addition, the record contains a “Response” to the petitioner’s 2006 Comments. In this “response,” [REDACTED] asserts that critics basing their concerns on the petitioner’s tests do “not change our conclusions about the toxic risks presented by that level of tungsten-bronze shot in the environment.” In another article, [REDACTED] reiterated his response that the petitioner’s work did not demonstrate the toxicity of tungsten in amounts prescribed by the U.S. Fish and Wildlife criteria to the general

environment. Thus, regardless of whether the petitioner's concerns are legitimate, [REDACTED] references to the petitioner's work do not demonstrate the petitioner's influence on [REDACTED] work.

On appeal, the petitioner submitted a letter from [REDACTED] characterizes the petitioner's publication record as "a modest research output over the past 4 years." [REDACTED] then concludes that the petitioner's research "will be very useful to researchers working on the fate of tungsten and tungsten compounds in diverse environments such as firing ranges and battle grounds, or other sites where tungsten compounds may predominate." [REDACTED] provides no examples of how independent researchers are already applying the petitioner's research.

In addition, the petitioner submitted an article in [REDACTED] (including one posted on the website of Families Against Cancer & Toxics. These articles are about the history of the U.S. military's attempt to develop less environmentally harmful bullets. Both articles note that the Stevens Institute of Technology concluded that the tungsten bullets could also contaminate soil. The first article, published in June 2004 and titled [REDACTED] references the petitioner's Ph.D. advisor, [REDACTED] study at the Stevens Institute of Technology and a second study at the same institute. The petitioner did not present his own work on Tungsten until October 2004. As such, it is not clear that these articles referencing work at the Steven Institute of Technology are specifically discussing the petitioner's work. We note that the petitioner's articles cite a 2004 article by [REDACTED] titled [REDACTED] [REDACTED] for the proposition that a previous study has shown tungsten dissolutions in soils.

In response to the director's request for additional evidence the petitioner submitted additional citations that postdate the filing of the petition, including another article by [REDACTED] questioning the conclusive nature of the petitioner's findings. We will not consider this evidence as being able to establish the petitioner's influence and, thus, eligibility, as of the date of filing. See 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. All of the case law on this issue focuses on the policy of preventing petitioners from securing a priority date in the hope that they will subsequently be able to demonstrate eligibility. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Reg'l. Comm'r. 1977); *Matter of Katigbak*, 14 I&N Dec. at 49; see also *Matter of Izummi*, 22 I&N Dec. 169, 175-76 (Comm'r. 1998) (citing *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981) for the proposition that we cannot "consider facts that come into being only subsequent to the filing of a petition.") Consistent with these decisions, a petitioner cannot secure a priority date in the hope that his recently published research will subsequently prove influential. Ultimately, in order to be meritorious in fact, a petition must meet the statutory and regulatory requirements for approval as of the date it was filed. *Ogundipe v. Mukasey*, 541 F.3d 257, 261 (4th Cir. 2008).

On appeal, the petitioner submits Department of Defense memoranda dated 2005, 2006 and 2007 referencing studies about tungsten at Department of Defense laboratories. The petitioner has never worked for the Department of Defense. The petitioner did submit a letter from [REDACTED] at the Armed Forces

Radiobiology Research Institute crediting the petitioner and his colleagues with important research on tungsten. While [REDACTED] has cited the petitioner's work, [REDACTED] did not present his own work internally until July 2007 and did not publish it until 2008, after the 2005 and 2006 memoranda. As such, the record does not establish that the petitioner's work has impacted Department of Defense policy.

The remaining evidence consists of letters. [REDACTED] states that the petitioner "performed high level research work on the environmental behavior of tungsten and tungsten heavy alloys." [REDACTED] confirms that the petitioner's work "has been of relevance" to the U.S. military. More specifically, [REDACTED] states that the petitioner "uncovered the basic mechanisms involved in the potential environmental release of tungsten and other heavy metals from tungsten heavy alloys currently in use by the US military." In addition, according to [REDACTED] the petitioner "has developed analytical techniques for characterizing corrosion products of tungsten munitions and is currently working on techniques to analyze tungsten speciation in environmental samples and correlate this with toxicity." [REDACTED] does not suggest that the petitioner's techniques are being adopted at independent laboratories or have otherwise influenced the field.

[REDACTED] asserts that, beginning in 2003, the petitioner performed his doctoral and postdoctoral research at the Stevens Institute of Technology's Center for Environmental Systems (CES). [REDACTED] further asserts that the petitioner "has been a pivotal contributor" to CES' studies on tungsten, which the Department of Defense has funded since 2001. [REDACTED] explains that the petitioner's "technical background in chemical and environmental engineering and his expertise in various spectroscopic techniques proved to be essential to grasp all the details and intricacies of the subject." Simple exposure to advanced technology constitutes, essentially, occupational training which can be articulated on an application for an alien employment certification. *NYS DOT*, 22 I&N Dec. at 221. Special or unusual knowledge or training, while perhaps attractive to the prospective U.S. employer, does not inherently meet the national interest threshold. *Id.*

[REDACTED] concludes that the petitioner has "performed high quality research on the corrosion and metal release mechanisms affecting tungsten composites and in remedial technologies for the removal of tungsten from contaminated soils and water." It can be argued, however, that most research, in order to receive funding, must present some benefit to the general pool of scientific knowledge. It does not follow that every researcher contributing to the general pool of scientific knowledge inherently serves the national interest to an extent that justifies a waiver of the job offer requirement. Finally, [REDACTED] asserts that the petitioner's recognition in the field is apparent from the publication of technical papers in highly regarded journals and his dissertation as a monograph. More significant than the dissemination of the petitioner's work is the influence of that work once disseminated in the field. Moreover, as discussed above, the record contains no evidence that, once published, the petitioner's dissertation has sold well. We reiterate that the record does not establish whether the publisher conducts peer review of the books it publishes or whether it is more akin to a vanity publisher.

██████████ a professor at the Stevens Institute of Technology, asserts that the petitioner worked on a preliminary project partially conducted in ██████████ provides similar information to that discussed above and states that the petitioner “has the used the results of his scientific research to develop environmental remediation plans for the United States Army at several of its permanent bases in the United States. The record contains no military remediation plans credited to the petitioner or letters from high level officials at the Department of Defense confirming that they actually implemented the petitioner’s remediation plans.

██████████ a professor at the University of New Haven, confirms that he has collaborated with the petitioner. While ██████████ confirms that the petitioner developed “remediation options,” he does not suggest that the U.S. Department of Defense implemented the petitioner’s remediation plans.

In a letter postdating the filing of the petition, ██████████ at the Polytechnic Institute of New York University (NYU-Poly), confirms that the petitioner is an adjunct professor at NYU-Poly. ██████████ asserts that the courses the petitioner teaches are highly specialized and difficult to staff. The issue of whether similarly-trained workers are available in the United States, however, is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

██████████ at NYU-Poly, asserts that the petitioner’s work “has significantly improved our understanding of the environmental processes involved in the release, speciation and subsequent effects of tungsten from tungsten heavy alloys in munitions” and has “developed remedial technologies for the removal of munitions components from contaminated soils and water.” ██████████ asserts generally that the petitioner’s work has “contributed to the US military’s efforts to develop and use more environmentally friendly ammunitions” but does not provide examples of how the Department of Defense has applied the petitioner’s work. ██████████ explains that the petitioner has developed analytical techniques and is working on other techniques, but provides no examples of independent laboratories using his techniques. ██████████ concludes that the petitioner’s “research output is of the highest quality with broad impacts and an international reputation having been featured and cited in various national and international journals and other media.” As discussed above, however, the minimal citations of the petitioner’s work are not indicative of an influence in the field. Moreover, this assertion is not consistent with ██████████ letter in which he characterizes the petitioner’s publication record as “a modest research output over the past 4 years.”

The petitioner did submit more independent letters. ██████████ a scientist at Osram Sylvania, asserts that he is familiar with the petitioner’s research because ██████████ studies on the leaching behavior of tungsten “have close relationship with” the petitioner’s research. ██████████ does not explain how he has applied or utilized the petitioner’s research.

As stated above, [REDACTED] asserts that the petitioner "and his colleagues" conducted "a great deal of the important research" demonstrating that tungsten ammunition is not less toxic than lead ammunition. USCIS need not accept primarily conclusory assertions.¹ [REDACTED], the only reference who works for the Department of Defense, provides no examples of how the petitioner's work is already being used by the Department of Defense or any other independent agency or institution. Instead, he states that the petitioner's research "will play a pivotal role in the elucidation" of the problem of health issues potentially caused by high levels of environmental tungsten.

On appeal, the petitioner submits a letter from [REDACTED] the Massachusetts Military Reservation Environmental Officer, who asserts that he and other professionals on the University of Massachusetts Scientific Advisory Board selected the petitioner's abstract for an international conference "because of its contribution to the understanding of tungsten chemistry." [REDACTED] continues:

[The petitioner's] presentation at the conference was on studies of the speciation of tungsten in environmental samples. The focus was on laser-desorption ionization and how it showed promising results in the qualitative and semi-quantitative analysis of tungsten species in environmental samples. His work in this highly specialized field has already significantly improved our ability to better understand the environmental aspects of tungsten on military ranges across the U.S.

The petitioner submitted the minutes of a July 21, 2004 Scientific Advisory Council meeting during which [REDACTED] cited "a study completed in 2003 by the Armed Forces Radiobiological Research Institute indicated serious toxicological consequences from tungsten alloy, where tungsten alloy pellets embedded in rates caused tumors." [REDACTED] then lists the Stevens Institute of Technology as one of three institutions that is pursuing research on tungsten. [REDACTED] notes research that tungsten is soluble in water and could potentially migrate. The petitioner, however, did not publish any research prior to October 2004 when he gave his first presentation. Thus, it does not appear to have been the petitioner's work that inspired [REDACTED] to pursue the safety of tungsten.

The Board of Immigration Appeals (the Board) has held that testimony should not be disregarded simply because it is "self-serving." *See, e.g., Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The Board also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Id.* If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998).

The opinions of experts in the field are not without weight and have been considered above. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought.

¹ *1756, Inc. v. The Attorney General of the United States*, 745 F. Supp. 9, 15 (D.C. Dist. 1990).

Id. The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may, as we have done above, evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)).

The letters considered above primarily contain bare assertions of the significance of the petitioner's work without providing specific examples of how his innovations have influenced the field. Merely repeating the legal standards does not satisfy the petitioner's burden of proof.² The petitioner failed to submit sufficient corroborating evidence in existence prior to the preparation of the petition, which could have bolstered the weight of the reference letters.

While the petitioner's research is no doubt of value, it can be argued that any research must be shown to be original and present some benefit if it is to receive funding and attention from the scientific community. Any Ph.D. thesis or postdoctoral research, in order to be accepted for graduation, publication or funding, must offer new and useful information to the pool of knowledge. It does not follow that every researcher who obtains a Ph.D. or is working with a government grant inherently serves the national interest to an extent that justifies a waiver of the job offer requirement. The record does not establish that the petitioner's work has influenced the field to a degree that would outweigh the inherent national interest in the alien employment certification process.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

² *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Similarly, USCIS need not accept primarily conclusory assertions. *1756, Inc.*, 745 F. Supp. at 15.

ORDER: The appeal is dismissed.